

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

In re L.A., a Person Coming Under the
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

L.A.,

Defendant and Appellant.

A142685

(Contra Costa County
Super. Ct. No. J1400415)

The juvenile court found true allegations that defendant and appellant L.A. committed assault, battery, and assault by force likely to produce great bodily injury following a traffic accident. Appellant contends the court erred in permitting the prosecution to ask leading questions of the victim after she claimed not to recall the incident, in failing to exclude photographs of the victim's injuries that were not timely disclosed to the defense, and in sustaining separate counts alleging assault and battery based on the same facts. We conclude the juvenile court erred in sustaining both the assault and battery counts, but otherwise affirm.

PROCEDURAL BACKGROUND

In May 2014, the Contra Costa County District Attorney filed a petition under Welfare and Institutions Code section 602, subdivision (a) alleging that appellant, born

June 1996, committed misdemeanor assault (Pen. Code, §§ 240, 241, subd. (a);¹ count one), misdemeanor battery (§§ 242, 243, subd. (a); count two); and misdemeanor assault by force likely to produce great bodily injury (§ 245, subd. (a)(4); count three). Count three was subsequently amended to allege a felony. In June 2014, an amended petition was filed alleging that appellant on a separate occasion committed misdemeanor battery on a spouse or co-habitant (§§ 242, 243, subd. (e)(1); count four).²

Following a contested jurisdictional hearing on July 15, 2014, the juvenile court sustained all counts of the amended petition. In August, the court adjudged appellant a ward of the court; ordered he be removed from the custody of his parents; and committed him to the Bar-O Boys Ranch for a maximum custody time of four years and eight months, or until he reached age 19, whichever occurred first. This appeal followed.

FACTUAL BACKGROUND

The charges at issue on appeal arose from an incident during which the victim, Micaela Kincaid-Castillo, side-swiped another car on the freeway late one night in November 2013; appellant was a passenger in the other car. At trial, the victim testified she largely did not recall the events of the evening. Therefore, most of the testimony about the accident and subsequent events came in the form of the victim's statements that evening to a California Highway Patrol officer, Curtis Costales, who investigated the incident and testified to her account at trial.

Costales testified that at about midnight on November 6, 2013, he responded to a report of a highway traffic accident in Pittsburg and a possibly related fight at a nearby market. When he arrived at the accident scene, he saw a white Ford in the center divide. After speaking to the driver of the Ford, he went to the parking lot of the market, less than a mile away. Costales spoke to the victim, who said she had been involved in a collision with the white Ford. She said she had been driving about 90 miles an hour and the accident was her fault. After the collision, her car came to a rest and she was

¹ Hereafter, all undesignated statutory references are to the Penal Code.

² The claims on appeal do not involve this additional offense, and it is not addressed further in this decision.

approached by several people, presumably from the other car. One of them opened the door to her car and that person and another punched her in the face with closed fists. The victim identified appellant as one of the people who hit her. She then drove to the market in an attempt to escape. Appellant and others followed her to the market, and appellant opened her car door and hit her again in the face and choked her.

Costales noticed swelling on the victim's face and marks on her neck that he believed to resemble marks from a choking. He identified four photographs as fair and accurate depictions of the victim at the market; the photographs showed blood around her nose and marks on her neck.

A cousin of appellant, Edward B., testified on appellant's behalf. Edward B. said he was with appellant in the car hit by the victim. After the victim drove away, another car pulled up and offered to follow the victim's car and give a ride to Edward B., appellant, and another individual. At the market, appellant stood by the victim's car in order to make sure she would not leave again, but he did not hit her.

DISCUSSION

I. *The Questioning of The Victim Did Not Violate the Confrontation Clause*

The prosecution called the victim as a witness in their case in chief. At the outset of her testimony, the victim stated she did not "want to testify against anyone." However, rather than refusing to testify, she answered the prosecutor's questions, albeit mostly by stating she did not recall what occurred the night of November 6, including being hit by appellant. The court stated it found the victim's claim not to recall the incident "not very credible." Eventually, the prosecutor obtained permission to ask the victim leading questions. Ultimately, the prosecutor asked a series of leading questions based on the account the victim gave to Officer Costales the night of the accident. Subsequently, the juvenile court permitted Costales to relate what the victim told him during his testimony.

On appeal, appellant contends the juvenile court denied his constitutional right to confront the witnesses against him by permitting the prosecutor to relate through leading questions the version of events the victim reported to Officer Costales, because the victim's assertion that she did not recall the events denied appellant an opportunity to

cross-examine her at trial regarding her statements to Costales. (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, § 15.) We disagree.³

A witness who “refuses to answer any question on direct or cross-examination denies a defendant the right to confrontation which contemplates a meaningful opportunity to cross-examine the witness.” (*People v. Rios* (1985) 163 Cal.App.3d 852, 864 (*Rios*); see also *Douglas v. Alabama* (1965) 380 U.S. 415, 419–420; *People v. Murillo* (2014) 231 Cal.App.4th 448, 456 (*Murillo*).) On the other hand, a witness who suffers from memory loss—real or feigned—is considered “subject to cross-examination” because her presence and responses provide the “jury with the opportunity to see the demeanor and assess the credibility of the witness.” (*People v. Gunder* (2007) 151 Cal.App.4th 412, 420 (*Gunder*); see also *ibid.* [“The circumstance of feigned memory loss is not parallel to an entire refusal to testify.”]; *United States v. Owens* (1988) 484 U.S. 554, 559 [opportunity to cross-examine not denied where witness suffers from memory loss].)

The circumstances in the present case are plainly in the category of (feigned) memory loss, rather than that of a complete refusal to testify. Accordingly, the confrontation clause was satisfied. Although the victim’s responses necessarily “narrowed the practical scope of cross-examination, her presence at trial as a testifying witness gave the [juvenile court] the opportunity to assess her demeanor and whether any credibility should be given to her testimony or her prior statements. This was all the constitutional right to confrontation required.” (*People v. Perez* (2000) 82 Cal.App.4th 760, 766 (*Perez*); accord *People v. Homick* (2012) 55 Cal.4th 816, 861 (*Homick*).) As explained in *Owens, supra*, 484 U.S. at page 560, “[t]he weapons available to impugn the witness’ statement when memory loss is asserted will of course not always achieve success, but successful cross-examination is not the constitutional guarantee.”

Although appellant points to some factual and procedural differences between the present case and *Homick* and *Gunder*, he does not explain why the critical distinction for

³ Because we reject appellant’s claim, we need not address respondent’s contention that appellant forfeited the claim by failing to object on confrontation clause grounds.

confrontation clause purposes between feigned memory loss and a refusal to testify is not equally applicable here. He contends we should reverse under the rationale of *Murillo*, *supra*, 231 Cal.App.4th 448, but his argument again fails to acknowledge that same distinction. In *Murillo*, “ ‘[t]he trial court allow[ed] the prosecutor to ask [a prosecution] witness more than 100 leading questions concerning the witness’s out-of-court statements to prove [the] defendant guilty of several criminal offenses.’ ” (*Id.* at pp. 449–450.) The witness refused to answer or said he had nothing to say. (*Id.* at p. 451.) The Court of Appeal concluded the prosecutor’s “questions create[d] the illusion of testimony[, which] deprived defendant of a fair trial because he could not exercise his constitutional right of cross-examination.” (*Id.* at p. 450.) As noted, the case law distinguishes between witnesses who feign memory loss and those who refuse to answer questions. The victim fell into the former category, while the witness in *Murillo* fell into the latter category.

Nor did juvenile court err in permitting the prosecutor to ask the victim a series of *leading* questions based on the account she gave to Officer Costales. In any event, any error was harmless beyond a reasonable doubt (*Chapman v. California* (1967) 386 U.S. 18, 24) because Officer Costales testified to her account at trial. Appellant does not dispute her account was admissible as an inconsistent statement,⁴ and, as explained previously, appellant received sufficient opportunity for cross-examination to satisfy the confrontation clause.

II. *The Juvenile Court Did Not Err in Failing to Exclude the Photographs*

At the start of the July 15, 2014 jurisdictional hearing, appellant’s counsel moved to exclude as “late discovery” photographs of the victim that he had received that morning. The prosecutor acknowledged the photographs had been given to defense

⁴ The inconsistent statement exception to the hearsay rule, Evidence Code section 1235, allows admission of “earlier statements of a witness . . . to prove the truth of their content where they are inconsistent with matters to which the witness testifies at trial. The inconsistency may either be express, or implied, and will be deemed implied where the court finds a witness falsely claiming failure to remember facts in order to deliberately avoid testifying as to those facts.” (*Rios, supra*, 163 Cal.App.3d at pp. 863–864; see also *Homick, supra*, 55 Cal.4th at p. 862.)

counsel that morning. She explained that she herself had only received the photographs that same morning, when a colleague handed her a compact disc received from the Antioch Police Department. She continued, “I see some file stamp of July 7th and then another one of July 11th. So it took a little bit of time to get to our office, I assume. The first time I saw it myself was this morning, and I immediately disclosed it to defense counsel.” The juvenile court denied appellant’s motion to exclude, and at trial four photographs depicting the victim’s injuries the night of the accident were admitted into evidence and relied upon by the court in sustaining the allegations against appellant. On appeal, appellant contends the juvenile court’s failure to exclude the photographs deprived him of his right to prepare an adequate defense. The claim fails.

“The People have a constitutional and a statutory duty to disclose information to the defense.” (*People v. Bowles* (2011) 198 Cal.App.4th 318, 325.) Section 1054.1 requires that the prosecution disclose a range of specified information to the defense, including “[a]ll relevant real evidence seized or obtained as a part of the investigation of the offenses charged.” (§1054.1, subd. (c).) The required disclosures shall be made at least 30 days before trial, and “[i]f the material and information becomes known to, or comes into the possession of, a party within 30 days of trial, disclosure shall be made immediately” (§ 1054.7.) “The trial court has broad discretion to fashion a remedy in the event of a discovery abuse to ensure that the defendant receives a fair trial. [Citation.] The trial court may enforce the discovery statutes by ordering ‘immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter, or any other lawful order.’ (§ 1054.5[, subd.] (b).) If these sanctions have been exhausted, the trial court may also prohibit the testimony of a witness. (§ 1054.5, subd. (c).)” (*Bowles*, at p. 325.)

Respondent does not deny it was obligated to disclose the photographs, and it is unclear whether they were disclosed immediately upon receipt by the district attorney’s office. However, appellant has not shown any violation of the discovery statutes required exclusion of the photographs or requires reversal on appeal. “ ‘[I]t is defendant’s burden to show that the failure to timely comply with any discovery order is prejudicial, and that

a continuance would not have cured the harm.’ ” (*People v. McKinnon* (2011) 52 Cal.4th 610, 668.) As in *McKinnon*, appellant “sought no continuance, and he made no showing that his defense would have been different had he been provided timely discovery of” the photographic evidence. (*Id.* at p. 668–669.)

Appellant complains that, because he was in custody, he should not have been required to request a continuance in order to remedy the discovery violation. But he cites no authority in support of that proposition, much less authority that would permit us to disregard the rule stated in *McKinnon* and other California Supreme Court cases. And, in any event, appellant makes no showing he was prejudiced by the late discovery. For example, he does not explain how his defense could have shifted to respond to the photographs of the victim’s injuries, had he been given them several days before trial.

III. *The Juvenile Court Erred in Sustaining Both Counts One and Two*

The juvenile court found true the allegation in count one that appellant committed misdemeanor assault “against the person of Micaela Kincaid-Castillo as it relates to her initial encounter on the freeway.” The court also found true the allegation in count two that appellant committed misdemeanor battery against the victim “as the initial assault and battery that was committed on her when she was punched on the roadway.” The parties agree the court based its true findings on both counts on the attack on the victim immediately following the accident, instead of the subsequent attack at the market. The parties also agree it was error for the juvenile court to sustain findings on both the battery charge and the lesser included assault charge based on the same facts. (*People v. Ortega* (1998) 19 Cal.4th 686, 692 [“A defendant who commits a battery may not be convicted of both battery and assault, because ‘[a]n assault is a necessary element of battery, and it is impossible to commit battery without assaulting the victim.’ ”].) We will reverse the true finding on count one and direct the juvenile court to recalculate appellant’s maximum time of confinement.⁵

⁵ The juvenile court’s dispositional order does not indicate what portion of the maximum time of confinement is due to the true finding on count one.

DISPOSITION

The true finding on count one is reversed. The juvenile court is directed to recalculate the maximum time of confinement. Otherwise, the juvenile court's orders are affirmed.

SIMONS, J.

We concur.

JONES, P.J.

BRUINIERS, J.